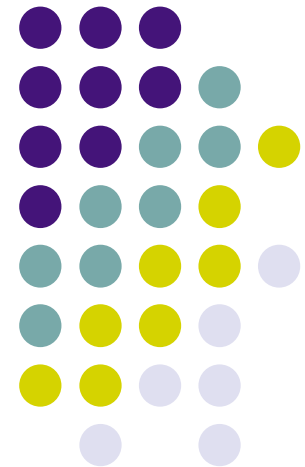


Opting Out of the Internet in the U.S. and the E.U.

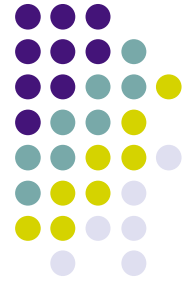
Centre Propriété Intellectuelle et Innovation –
Facultés universitaires Saint-Louis
Centre de Recherche Informatique et Droit –
Facultés universitaires Notre-Dame de la Paix Namur
Chaire Arcelor – Université catholique de Louvain

Sept. 28, 2007

Hannibal Travis



Google on Google Book Search



- “Google Book Search allows publishers and authors to submit their books for inclusion in Google’s search results.”
 - Google Book Search Partner Program Site
- “We're happy to remove your book from our [Library Project] search results at any time, just as we do for website publishers. You'll need to ... identify yourself as the owner and let us know which books to exclude.”
 - Google Book Search Library Project Site

Publishers on Google Book Search




- “Publishers should be asked to opt in to the project and not to opt out.”
 - Sally Morris, chief executive of U.K.-based Association of Learned and Professional Society Publishers.
- "Google's procedure shifts the responsibility for preventing infringement to the copyright owner and away from the user, turning every principle of copyright law on its ear.”
 - Patricia Schroeder, president and chief executive of U.S. Association of American Publishers

YouTube on Opting In/Out




- YouTube established “Channels” with CBS and other companies who designated specific clips for viewing.

CBctv




Joined: 6 months ago
Videos: 223
Views: 33,158

Recent Video




[Dragons' Den](#)

CBS



Joined: 1 year ago
Videos: 3,125
Views: 2,578,391

Recent Video



[Arizona State The Best Stud...](#)

YouTube on Opting In/Out



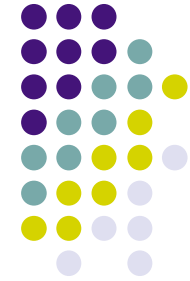
- YouTube bought by Google for \$1.65B
- Viacom is suing YouTube for \$1B
 - Alleged that 160,000 infringing video clips have been viewed more than 1.5 billion times
- YouTube is facing many other complaints
 - Imposed “10 minute rule” after complaints by NBC
 - Class action by Premier League, National Music Publishers Assn., boxing and other groups
 - Japanese broadcasters alleged 30,000 infringing clips
- YouTube is beginning to place 10-second ads on clips of 1,000 content “partners”
 - Not on the clips uploaded by users

YouTube on Opting In/Out



- YouTube allows users to upload videos that may be copyrighted, subject to taking them down.
 - "Anytime we become aware that a video or any part of a video on our site infringes the copyrights of a third party, we will take it down from the site. We are required to do so by law. If you believe that a video on the site infringes your copyright, send us a copyright notice and we will take it down."
- YouTube has "copyright protection tools" that help owners find allegedly infringing clips and prevent reloading of same clip.

YouTube on Opting In/Out



[Sign Up](#) | [My Account](#)

Videos

Categories

Channels

Community

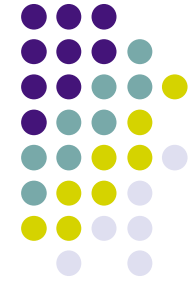
Search

Copyright Infringement Notification

To file a copyright infringement notification with us, you will need to send a written communication that includes substantially the following (please consult your legal counsel or see Section 512(c)(3) of the Copyright Act to confirm these requirements):

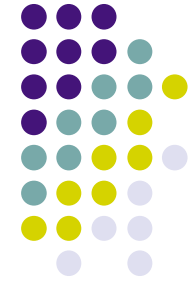
- i. A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.
- ii. Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.
- iii. Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material. **Providing URLs in the body of an email is the best way to help us locate content quickly.**

U.S. Cases Supporting an Opt-In Requirement



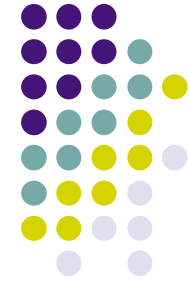
- **Newspapers** – Web site should have obtained permission for articles posted by users.
 - *L.A. Times v. Free Republic* (C.D. Cal. 2000)
- **Music** – Software producer had to obtain permission for every copyrighted song it helped users to access.
 - *A&M Records v. Napster* (9th Cir. 2001)
- **Books** – Internet service provider (AOL) should have secured permission for books its users posted to newsgroups (triable issue of fact).
 - *Ellison v. Robertson* (9th Cir. 2004)

Reasons Supporting an Opt-In Requirement



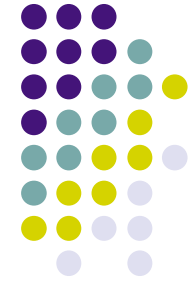
- **Contribution to infringement** – A company having reason to know that users are posting infringing materials for distribution through its online service is liable for contributory infringement of copyright.
 - *Ellison v Robertson* (9th Cir. 2004)
- **Profiting from infringement** – A company with the right and ability to terminate user accounts due to infringement, which fails to do so while profiting from increased number of customers drawn by access to copyrighted works, is liable for vicarious infringement.
 - *A&M Records v. Napster* (9th Cir. 2001)
- **Unfair use** – When users post entire copyrighted works to a for-profit Web site, that diminishes the advertising revenue earned by the copyright owner.
 - *L.A. Times v. Free Republic* (C.D. Cal. 2000)

Cases Supporting an Opt-Out Copyright System



- **Search engines** – Search engine for images was not liable for copying and creating “thumbnail” previews of plaintiff’s photographs from where it deleted them as soon as plaintiff complained.
 - Kelly v. Arriba Soft (9th Cir. 2003)
- **Web cache** – Search engine was not liable for copying Web sites for users to download from “cache” where Web site publisher could have, but did not, request exclusion from caching process.
 - Field v. Google (D. Nev. 2006)
- **E-commerce sites** – Sites that expeditiously remove access to vendors’ infringing content are not liable.
 - Corbis Corp. v Amazon.com, Inc. (W.D. Wash. 2004)
 - Hendrickson v Amazon.com, Inc. (C.D. Cal. 2003)

Reasons for Adopting an Opt-Out Copyright System



- **Fair use** – Where a company is not using plaintiff’s works “to directly promote its web site nor trying to profit by selling” the works, but rather to improve access to information on the Internet, that may be a fair use. Respecting opt-outs is evidence of intent.
 - Kelly v. Arriba Soft (9th Cir. 2003)
- **Fair use** – Promptly disabling access to works in a cache after an opt-out shows good faith and is consistent with “socially valuable” fair use.
 - Field v. Google (D. Nev. 2006)
- **Safe Harbor** – DMCA provided a defense to Internet service providers who remove infringing material upon obtaining notice, so they don’t have to monitor their sites and “make discriminating judgments about potential copyright infringements.”
 - Hendrickson v Amazon.com, Inc. (C.D. Cal. 2003)

E.U. Precedents for Limitations on Exclusive Rights



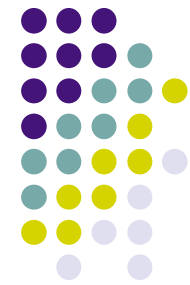
- **Electronic Commerce Directive** – Information services that store information provided by their users are not liable where they are “not aware of facts or circumstances from which the illegal activity or information is apparent; or ... upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.”
 - 2000/31/EC, Art. 14

E.U. Precedents for Limitations on Exclusive Rights



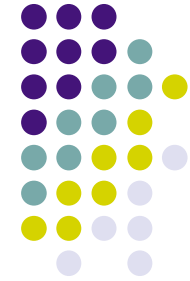
- **Intermediary copyright liability** – Internet service provider was not liable under Dutch law without knowledge or reason to know of the wrongful act.
 - *Scientology*, (Pres. of Dist. Ct. of the Hague 1996)
- **Publishers' defamation liability** – Publishers are not liable for publishing defamatory matter in Germany unless its illegality is apparent – a contrary rule would inhibit the constitutional right to free expression.
 - *Pressehaftung I*, (German Supreme Court 1990)
 - See Kamiel J. Koelman, *Online Intermediary Liability*, in Copyright and Electronic Commerce (Kluwer Law Int'l 2000)

E.U. Precedents for Limitations on Exclusive Rights



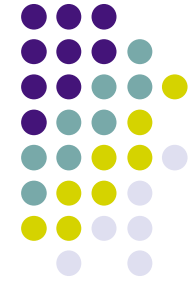
- **“Short Fragments”** – “Once a work has been lawfully published, its author may not prohibit: (1) reproduction and communication to the public, for the purposes of information, of short fragments of works....”
 - Belgium's Law on Copyright (1994), Art. 22.
- **“Short Quotations”** – “Once a work has been disclosed, the author may not prohibit [if the author and source are stated]: (a) Analyses and short quotations justified by the critical, polemic, educational, scientific or informatory nature of the work in which they are incorporated.”
 - France's Intellectual Property Code, Art. L 122-5

Economic Benefits of an Opt-Out Copyright System



- **Innovation** – New software and Web tools become possible under an opt-out system because it does not “chill” innovation with the threat of liability.
- **Efficiency** – Licensing costs are only incurred for works whose authors are actively exploiting, or whose income may be damaged by online reproduction, display, etc.
- **Access to information** – The public’s ability to “sample” copyrighted works before buying, and to participate as democratic citizens, is enhanced.
 - See Oren Bracha, *Standing Copyright Law on Its Head? The Googlization of Everything and the Many Faces of Property*, 85 Tex. L. Rev. (2007)

Possible Costs of an Opt-Out Copyright System



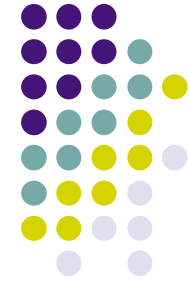
- **Equity** – Authors or artists who cannot afford to actively monitor and police use of their works undergo infringement that large firms will not.
- **Incentives** – Potential exists that licensing revenues, and incomes to authors and artists, will be higher under an opt-in system.
- **Access to information** – Companies who invest in distributing information in print or recorded media to the public may reduce their operations.

Effects of a Strictly Opt-In System on Google Users



- Fewer books to search
 - Users find it more difficult to find books they would like to buy, borrow, or research.
 - Authors may experience lower sales as their publishers fail to opt-in to maintain control.
- Fewer videos on YouTube
 - Many old movies, TV shows are simply lost.
 - The public remains ignorant of many newsworthy events and episodes in history.
 - Political debates are less free and open.

Effects of a Strictly Opt-In System on International Trade



- Opt-out “havens” could develop for information location tools and e-commerce.
 - Analogy to Antigua v. U.S. (WTO 2007)
- Countries sticking with opt-in system could lose high-tech firms.
 - U.S. is losing leadership in peer-to-peer software.
- The stakes of international jurisdictional disputes will be raised.
 - Analogy to La Ligue Contre le Racisme et L'Antisemitisme (LICRA) v. Yahoo!